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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. ANTHONY AUZENNE, Defendant and Appellant.	B171488 (Los Angeles County Super. Ct. No. KA063494)

APPEAL from a judgment of the Superior Court of Los Angeles County, Kevin C. Brazile and Jose Rodriguez, Judges. Affirmed.

William J. Capriola, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Jaime L. Fuster and Lance E. Winters, Supervising Deputy Attorneys General, for Plaintiff and Respondent.

Anthony Auzenne appeals from judgment entered following the denial of his motion pursuant to Penal Code section 1538.5 and his guilty plea to one count of possession of a controlled substance in violation of Health and Safety Code section 11377, subdivision (a). Imposition of sentence was suspended, and he was placed on probation pursuant to Penal Code section 1210.1, for five years, upon various terms and conditions. He contends the search warrant was issued without probable cause and should have been quashed by the trial court. For reasons explained in the opinion, we affirm the judgment.

FACTUAL AND PROCEDURAL SUMMARY

On September 22, 2003, appellant and co-defendant Eric Auzenne filed a motion to quash a search warrant and suppress as evidence all tangible and intangible evidence seized on or about September 16, 2003, by officers of the Los Angeles County Sheriff's Department from property located at 14626 Homeward Street in Valinda, California, and the person of Anthony Auzenne. Appellant asserted that the information from an untested informant without adequate corroboration did not provide adequate probable cause to justify the search warrant.[1]

The affidavit by Los Angeles County Deputy Sheriff Stephen Maroun in support of the search warrant, which was issued on September 16, 2003, states in relevant part between the dates of July 17, 2003 and August 11, 2003, he was contacted by a confidential informant who told him "that a person who is known to him/her as Eric Auzenne . . . is selling small amounts of methamphetamine from his residence at 14626 Homeward St. in La Puente. [¶] The C.I. who is a self-admitted methamphetamine user, agreed to assist me in this investigation by

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[1] Eric Auzenne is not a party to this appeal.

making a purchase of an amount of methamphetamine from Eric Auzenne at the location. [¶] I questioned the C.I. on the subjects of methamphetamine; its uses, and found that he/she was competent on the subject of methamphetamine. [¶] I caused the C.I. to be searched for currency and contraband and met with negative results. [¶] I provided the C.I. with an undisclosed amount of county advanced funds and directed him/her to the location. Det. Felix assisted me in maintaining a surveillance of the C.I. The C.I. approached the open door of the converted garage. The C.I. then entered the location and exited about five minutes later. The C. I. then went to a pre-designated location and handed me a quantity of methamphetamine. The C. I. told me that he/she had purchased the methamphetamine from Eric Auzenne at the location. [¶] I caused the C. I. to be searched again with negative results. [¶] . . . [¶] Shortly after the purchase of the methamphetamine was made from Eric Auzenne, the C.I. informed me that Eric Auzenne had temporarily suspended his sales of methamphetamine, due to his fearing detection by law enforcement. [¶] Between the dates of 8-15-03 and 8-19-03, I contacted a confidential reliable informant, hereafter referred to as the C.R.I. in this affidavit. I believe that the C.R.I. is reliable because he/she has provided [three named narcotics detectives] information regarding illegal narcotic users on at least seven different occasions within the past year. The information resulted in the services of several search warrants, the arrests of several cocaine and methamphetamine sellers, and the seizures of methamphetamine and cocaine. [¶] . . . [¶] I asked the C.R.I. if he/she could attempt to make a purchase of methamphetamine from Eric Auzenne at the location. [¶] I caused the C.R.I. to be searched for contraband and currency and meth with negative results. [¶] I provided the C.R.I. with an undisclosed amount of county founds and directed him/her to the location. [¶] Det. Auner and myself maintained a surveillance of the C.R.I. [¶] We observed the C.R.I. speaking to a male matching the description

and photo of Eric Auzenne, in the front yard of the location. About five minutes went by and the C.R.I. left the location and went to a predesignated location and met with me. [¶] The C.R.I. told me he/she had a conversation with the male described as Eric Auzenne. The C.R.I. asked this male, to sell him/her some methamphetamine. The C.R.I. said that the male said ok then turned to walk into the converted garage when a female adult, who was standing in the open garage, told the C.R.I. that they are not going to sell to him/her because they don't know him/her. [¶] During the early evening hours on 8-20-03, I drove by 14626 Homeward Street and observed the male matching the description of Eric Auzenne standing in the yard next to the garage. [¶] Between the dates of 08-20-03 and 09-01-03, the C.I. re contacted me and advised that Eric Auzenne was selling methamphetamine again but he/she could not buy from him. [¶] During the early evening hours on 09-11-03, I drove by 14626 Homeward Street and saw that the converted garage door was open and a male adult was standing in the yard in front of the door. This male appeared to be conversing with someone inside the converted garage. [¶] I showed a copy of a booking photo to the C.I. The C.I. positively identified the person in the photo as Eric Auzenne." It was Detective Maroun's expert opinion that Eric Paul Auzenne was involved in the sale of methamphetamine at the subject location.

DISCUSSION

Appellant contends the information in the search warrant affidavit was insufficient to establish probable cause. He asserts that the officer received information from an untested confidential informant that Eric Auzenne was selling methamphetamine at the location to be searched. Appellant asserts that while the C.I. agreed to make a controlled buy, the affidavit does not indicate when either the search or the buy took place and whether these events occurred in close temporal

proximity to each other. Further even though the officers watched the C.I. enter and leave the converted garage at the property and met the C.I. at a prearranged location there is no mention of the length of time between these events, the officers do not claim to have actually seen the C.I. make a purchase and do not claim to have maintained visual contact with the C.I. after he/she left the location of the alleged buy. Appellant also asserts that the affidavit does not support an inference that the source was trustworthy. Appellant also argues that while the police enlisted the assistance of a formerly reliable informant, the C.R.I. failed to purchase drugs from the premises. The C.R.I.'s statement that the residents would not sell to him/her because they did not know him/her, was at best self-serving and did not really corroborate any of the information provided by the untested C.I. Appellant also asserts the information provided by both the C.I. and C.R.I. was too stale. Appellant asserts, putting aside all of the other problems, any probable cause generated by the incidents was vitiated by the passage of time when the affidavit was presented on September 16, 2003.

"'The standard by which a magistrate must determine whether an affidavit is sufficient to establish probable cause . . . is explained in *Illinois v. Gates* (1983) 462 U.S. 213, 238-239 . . . : "The task of the issuing magistrate is simply to make a practical, commonsense decision whether, given all the circumstances set forth in the affidavit before him, including the 'veracity' and 'basis of knowledge' of persons supplying hearsay information, there is a *fair probability* that contraband or evidence of a crime will be found in a particular place."' [¶] Probable cause 'is a fluid concept--turning on the assessment of probabilities in particular factual contexts--not readily, or even usefully, reduced to a neat set of legal rules.' [Citation.] It is less than proof beyond a reasonable doubt [citation]; less than a preponderance of the evidence [citation]; and less than a prima facie showing [citation]. [¶] Probable cause is a 'particularized suspicion' [citation]; it is 'facts

that would lead a man of ordinary caution . . . to entertain . . . a *strong suspicion* that the object of the search is in the particular place to be searched' [citation.]; 'probable cause requires only a . . . substantial chance.' [Citation.] [¶] . . . [¶] 'The essential protection of the warrant requirement of the Fourth Amendment' relies upon 'a neutral and detached magistrate.' [Citation.] The magistrate acts as a trier of fact in appraising and weighing the affidavit. [Citation.] He may reject an affidavit as not credible or not sufficient. He may also 'before issuing the warrant, examine on oath the person seeking the warrant and any witnesses he may produce . . . .' [Citation.] [¶] 'A magistrate's "determination of probable cause should be paid great deference by reviewing courts."' [Citation.]" (*People v. Tuadles* (1992) 7 Cal.App.4th 1777, 1782-1783.)

"In reviewing a trial court's denial of a motion to suppress evidence obtained pursuant to a warrant, '[w]e defer to the trial court's factual findings, express or implied, where supported by substantial evidence. In determining whether, on the facts so found, the search or seizure was reasonable under the Fourth Amendment, we exercise our independent judgment. [Citations.]' [Citations.] Although we give great deference to the magistrate's determination of probable cause [citation], the purpose of our review '". . . is to insure that the affidavit supplies facts of cause to search so that the magistrate issuing the warrant decides upon the existence of cause with judicial detachment and does not act as a rubber stamp. [Citations.] . . ."' [Citation.] [¶] . . . Information that is remote in time may be deemed stale and thus unworthy of consideration in determining whether an affidavit for a search warrant is supported by probable cause. Such information is deemed stale unless it consists of facts so closely related to the time of the issuance of the warrant that it justifies a finding of probable cause at that time. The question of staleness turns on the facts of each particular case. [Citations.] If circumstances would justify a person of ordinary prudence to

conclude that an activity had continued to the present time, then the passage of time will not render the information stale. [Citation.]" (*People v. Hulland* (2003) 110 Cal.App.4th 1646, 1651-1652.)

"Although there is no bright line rule indicating when information becomes stale [citation], delays of more than four weeks are generally considered insufficient to demonstrate present probable cause. [Citations.] For example, a delay of 34 days between a controlled sale of heroin and the officer's affidavit for the search warrant has been held insufficient to establish present probable cause. [Citation.] Longer delays are justified only where there is evidence of an activity continuing over a long period of time or the nature of the activity is such as to justify the inference that it will continue until the time of the search. [Citation.]" (*People v. Hulland, supra,* 110 Cal.App.4th 1646, 1652.)

Here the record establishes there was a controlled buy of methamphetamine between July 17, 2003 and August 11, 2003 and that shortly after the purchase and within this same approximate time frame the confidential informant reported that Auzenne had temporarily suspended selling methamphetamine. Between August 15 and August 19, a confidential reliable informant attempted to make a controlled buy but was unable to because a female with Auzenne indicated they would not sell to the C.R.I. because they did not know him or her. Between August 20 and September 1, the C.I. contacted the detective and stated Eric Auzenne was again selling methamphetamine but he/she could not buy from them. On September 11, the detective drove by the location and saw an adult male standing in the yard talking with someone in the converted garage.

The controlled buy at the latest occurred on August 11, and there was arguably still some evidence of drug sales continuing to August 19. Thereafter, though, the only other activity was the statement by the C.I. who said Auzenne was again selling methamphetamine. This, however, was nothing more than a

conclusory statement that gave the magistrate no basis for determining probable cause. It contained no facts that show the basis of the confidential informant's knowledge. (See *Rodriquez v. Superior Court* (1988) 199 Cal.App.3d 1453, 1464.) The next activity reported was that when the detective drove by the location he saw an adult male standing in the yard appearing to be talking to someone in the converted garage. That, however, was not an activity that would give rise to the inference that the sale of drugs was occurring. We conclude, therefore, that the information in the affidavit was stale and based on the totality of circumstances fails to establish probable cause.

Having so concluded, we must next decide whether the good faith exception to the exclusionary rule would apply. (See *United States v. Leon* (1984) 468 U.S. 897, 104 S.Ct. 3405.) "This exception provides that evidence obtained in violation of the Fourth Amendment need not be suppressed where the officer executing the warrant did so in objectively reasonable reliance on the warrant's authority. The test for determining whether the exception applies is 'whether a reasonably well trained officer would have known that the search was illegal despite the magistrate's authorization.' [Citation.]" (*People v. Hulland*, *supra,* 110 Cal.App.4th at p. 1653.)

"The officer's reliance on the warrant is not objectively reasonable if the record reflects that '(1) the issuing magistrate was misled by information that the officer knew or should have known was false; (2) the magistrate wholly abandoned his or her judicial role; (3) the affidavit was so lacking in indicia of probable cause that it would be entirely unreasonable for an officer to believe such cause existed; [or] (4) the warrant was so facially deficient that the executing officer could not reasonably presume it to be valid. [Citations.]' [Citation.]" (*People v. Hulland, supra*, 110 Cal.App.4th at p. 1654.) We find none of these circumstances in the instant case. Here the statement from the C.R.I. that Eric Auzenne was still selling

methamphetamine from his garage but that he/she could not buy from him was just four weeks old. While we have determined that legally this affidavit was factually insufficient, it was not so wholly lacking in indicia of probable cause as to render the deputy's belief in its existence entirely unreasonable and conclude suppression is not required since the officer executing the warrant relied in good faith on the warrant under the *Leon* standard. (See *Rodriguez v. Superior Court, supra,* 199 Cal. App. 3d 1453, 1466-1467.)

DISPOSITION

The judgment is affirmed.

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CURRY, J.

We concur:

EPSTEIN, P.J.

HASTINGS, J.